

081296 APR 17 2009

120
①
No. _____

OFFICE OF THE CLERK

In the
Supreme Court of the United States

LESLEY SIMMONS ST. GERMAIN;
HILLARY ROSE HILLYER;
MELISSA BRANIGHAN LUMINAIS

Petitioners,

v.

D DOUGLAS HOWARD, JR;
D DOUGLAS HOWARD, JR & ASSOCIATES;
HOWARD & REED, ATTORNEYS AT LAW

Respondents.

*On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

MARK EDW. ANDREWS
Counsel of Record
ANDREWS ARTS & SCIENCES LAW, LLC
7104 COLISEUM STREET
NEW ORLEANS, LA 70118-4818
MEA@MEALAW.COM
504-865-8191

Attorney for Petitioners

QUESTIONS PRESENTED

1. To avoid Rule 12(b)(6) dismissal of a civil RICO complaint, is the standard of pleading a "criminal act" standard, heightened above the plausibility standard?

2. Must civil RICO plaintiffs file a complaint pleading the same heightened level of fact, before discovery, as would be available to the government after a criminal investigation?

3. In an alleged civil RICO mail and wire fraud scheme pleading the specific circumstances of the fraud, where the fraudulent scheme is additionally alleged to violate state law governing attorney conduct, where three plaintiffs allege direct economic damage from a continuing pattern of a scheme perpetrated by a RICO person and a RICO enterprise, is the civil RICO complaint properly dismissed under Rule 12(b)(6) because it fails to allege "predicate criminal acts"?

4. Where a civil RICO complaint is dismissed under Rule 12(b)(6) four months after filing, the complaint has never been amended, no responsive pleading has been made, and plaintiffs express an intent to amend, is amendment under Rule 15(a) properly denied with no analysis or finding of undue delay, dilatory motive, undue prejudice, repeated failure, or futility, but rather because plaintiffs filed a RICO case statement as required by a RICO standing order and filed a memorandum in opposition to a motion to dismiss?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners:

Lesley Simmons St. Germain is a natural person of majority and resident of New Orleans, Louisiana.

Hillary Rose Hillyer is a natural person of majority and resident of New Orleans, Louisiana.

Melissa Branighan Luminais is a natural person of majority and resident of Jefferson Parish, Louisiana.

Defendants-Appellees and Respondents:

Desmond Douglas Howard, Jr., Attorney at Law, is a natural person of majority maintaining a professional office in New Orleans, Louisiana, and being admitted to practice in Louisiana, Bar. No. 7021.

D. Douglas Howard, Jr., and Associates, is a law firm of unknown structure, not registered with the Louisiana Secretary of State.

Howard and Reed, Attorneys at Law, is a law firm of unknown structure, having offices in New Orleans and Covington, Louisiana, not registered with the Louisiana Secretary of State. Former names of the law firm are Howard, Reed and Taylor, and Howard, Laudumiey, Mann, Reed & Hardy.

TABLE OF CONTENTS

Questions Presented	i
Rule 14.1(b) Statement	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Controlling Precedent	10
Reasons for Granting the Petition.	11
I. The Fifth Circuit's "criminal act" pleading standard conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.	11
A. The Fifth Circuit imposed a heightened pleading standard in excess of Rules 8 and 9(b).	11
B. The Fifth Circuit's demurring to apply the plausibility standard here conflicts with the Seventh Circuit.	12
II. The Fifth Circuit's dismissal of a civil RICO action alleging mail and wire fraud, which additionally alleged violations of rules and state law regulating attorneys, conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.	14

A.	The Fifth Circuit's decision here conflicts with part III-C of <i>Bridge</i> , and the consistent line of prior decisions referenced therein.	14
B.	The Fifth Circuit's holding that an alleged civil RICO violation is categorically not actionable where it also implicates rules regulating attorneys conflicts with the Eighth Circuit. .	15
III.	The Fifth Circuit's rule formulaically justifying denial of amendment as of right conflicts with Rule 15(a), the decisions of this Court, and other circuit courts.	15
A.	The Fifth Circuit's opinion here has already been used as precedent for denial of amendment in a later decision.. . . .	16
B.	The Fifth Circuit's rule here conflicts with the Seventh and Third and, apparently, with all other circuits.. . . .	17
IV.	Categorical dismissal of civil RICO actions against attorneys justified by reference to state rules or state laws regulating attorneys will lead to different results under different states' rules and laws.	17
Conclusion	. . . . .	18
Appendix A, Circuit Court Opinion	. . . . .	1a
Appendix B, District Court Order	. . . . .	6a
Appendix C, District Court Judgment	. . . . .	7a
Appendix D, RICO Standing Order	. . . . .	8a
Appendix E, Relevant Statutes	. . . . .	12a

TABLE OF AUTHORITIES

CASES

<i>Anza v. Ideal Steel Supply Corp.</i> , 547 U.S. 541, 126 S.Ct. 1991 (2006)	2
<i>Arthur v. Maersk, Inc.</i> , 04-3670 (3rd Cir. 1/13/2006) 434 F.3d 196	17
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955 (2007).	12, 13
<i>Bridge v. Phoenix Bond & Indemnity Co.</i> , 553 U.S. ___, 128 S.Ct. 2131 (2008)	10, 13, 14
<i>Erickson v. Pardus</i> , 551 U.S. 89, 127 S.Ct. 2197 (2007) (<i>per curiam</i>)	12
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227 (1962)	15, 16
<i>Foster v. Deluca</i> , 05-1491 (7th Cir. 9/29/2008) 545 F.3d 582	17
<i>Handeem v. Lemaire</i> , 95-3679 (8th Cir. 5/7/1997) 112 F.3d 1339 . . .	14, 15
<i>Limestone Development Corp. v. Village of Lemont, Ill.</i> , 07-1438 (7th Cir. 4/1/2008) 520 F.3d 797 . . .	12, 13
<i>Price v. Pinnacle Brands, Inc.</i> , 97-10623 (5th Cir. 4/22/1998) 138 F.3d 602 . . .	16
<i>St. Germain v. Howard</i> , 08-30364 (5th Cir. 1/20/2009) 556 F.3d 261. . .	1, 9
<i>The Torch Liquidating Trust v. Stockstill</i> , 08-30404 (5th Cir. 2/23/2009)	16

FEDERAL STATUTES

18 U.S.C. §1341 (2008)	2, 14
18 U.S.C. §1343 (2008)	2, 14
18 U.S.C. §1346 (2008)	2, 6, 15
18 U.S.C. §1961 (2006)	2, 12
18 U.S.C. §1962 (2006)	2, 13
18 U.S.C. §1964 (2006)	2, 13
28 U.S.C. §1254(1) (2007)	1
28 U.S.C. §2101(c) (2007)	1

RULES

Federal Rule of Civil Procedure 8.	12
Federal Rule of Civil Procedure 9(b)	12
Federal Rule of Civil Procedure 12(b)(6)	12
Federal Rule of Civil Procedure 15(a).	15, 16

STATE CASES

<i>D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS, 2009-2267, Civil District Court, Orleans, LA</i>	5
<i>Husk v. Blancand, 155 La. 816, 99 So. 610 (1924)</i>	5
<i>Leenerts Farms, Inc. v. Rogers, 421 So.2d 216 (La. 1982).</i>	5
<i>Walker v. State, 817 So.2d 57 (La. 2002)</i>	5

PETITION FOR WRIT OF CERTIORARI

Lesley Simmons St. Germain, Hillary Rose Hillyer, and Melissa Branighan Luminais, Plaintiffs—Appellants in the civil RICO action below, respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, *St. Germain v. Howard*, 08-30364 (5th Cir. 1/20/2009) 556 F.3d 261, is a published opinion, and is reproduced at Appendix A, 1a-5a.

The Order of the U.S. District Court for the Eastern District of Louisiana in case number 07-9040, dated 5 March 2008, and Judgment dated 6 March 2008, are reproduced at Appendices B and C, 6a-7a.

The RICO Standing Order routinely entered in civil RICO cases in the Eastern District of Louisiana, ordered by that court *en banc* on 3 June 1987, and entered in the instant case on 27 November 2007, is reproduced at Appendix D, 8a-11a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on 20 January 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 18 U.S.C. §§ 1961, 1962, 1964, 1341, 1343, and 1346, which are reproduced at Appendix E, 12a-15a.

STATEMENT OF THE CASE

“Judicial sentiment that civil RICO’s evolution is undesirable is widespread”¹ is an observation providing a useful framework for understanding this case.

The three Petitioners here filed a civil RICO complaint against their common former divorce attorney, alleging the following facts.

The three Petitioners here, as civil RICO Plaintiffs and Appellants below, are three former clients of a divorce attorney in New Orleans. In a continuing pattern making use of the mails and wires, commencing in 2005 for one, in 2006 for another, and in 2007 for the third, Plaintiffs allege that they were fraudulently overbilled in a variety of specified ways, fraudulently billed by an unauthorized law firm, subjected to extortionate threats of the Defendant attorney’s abrupt withdrawal, subjected to the Defendant attorney’s actual abrupt and unlawful withdrawal, and—in total—inadequately represented in their divorces as a result of the Defendants’ fraudulently taking their money but failing to perform.

Although Defendants are in exclusive control of much evidence and knowledge, including exactly how their two law firms are constituted and connected, Plaintiffs were able to assemble and append to their Complaint thirty pages of documentary evidence—proving that mailings were sent, money was billed and

1. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 541 (2006) (THOMAS, J., concurring in part and dissenting in part).

paid, contracts with unlawful provisions were signed, unlawful abrupt withdrawals were perpetrated, and showing or proving other aspects of the alleged mail and wire fraud scheme.

Plaintiffs alleged the exact dates, senders, recipients, and contents of mailings in paragraphs 27, 31, and 35 of the Complaint (R.12). The various fraudulent contents of the mailings were specified in other paragraphs, grouped according to the various provisions of state law violated by different facets of the alleged scheme.

Plaintiffs alleged in paragraphs 40 and 54 of the Complaint (R.13&17), and elsewhere, that Defendants performed "unauthorized and/or overbilled work" in order to run up the bills, and in paragraphs 55-57 (R.17) alleged specific examples of improperly-billed work.

Plaintiffs were able to both allege and prove in the Complaint one small but nevertheless fraudulent aspect of Defendants' scheme, in paragraph 42 of the Complaint (R.14), and with proof in Exhibits P-2, P-3, and P-5. Using mailed billings, Defendants collected ten (\$10) dollars per month per victim as overhead fees from Plaintiffs without even having a supposed contractual authority to do so.

In preparing their civil RICO action, Plaintiffs examined the case files of the extensive litigation that Defendant attorney had habitually brought against clients and former clients in state court, where Defendant attorney practices and is well known. Such case files contained copies of contracts having unlawful provisions on their faces, and other evidence that Defendants' fraudulent actions constituted a long-standing continuing pattern. A list of Defendant attorney's lawsuits against his clients was made Exhibit P-1 to the civil RICO Complaint (R.33).

The three clients signed contracts of employment for legal representation with those contracts clearly naming a specific law firm. Those contracts are attached as Exhibits P-2, P-4, and P-7 to the Complaint (R.34-36,39-41,&51-54). The three clients were subsequently billed by— and paid money to— a different law firm than the one named in the contract. The bills were sent by U.S. Mail. Sample bills are attached to the Complaint as Exhibits P-5 and P-8 (R.42-49,&55-59).

Plaintiffs, as clients of Defendant attorney, received by U.S. Mail billing statements either instructing the payment of money or purportedly justifying the debiting of money from an already-paid retainer fee. Not all, but some of the aspects of the larger fraudulent scheme are visible on the faces of the mailings which are attached to the Complaint in this case. The face of the billing statements show (1) that money was being billed by, and paid to, a law firm which was not authorized to take any money from Plaintiffs, (2) an overhead fee was being charged, and (3) the overhead fee was arbitrarily ten (\$10) dollars per month per client more than was even purportedly allowed under the contracts. The certified mailing of 21 November 2006, Exhibit P-6 to the Complaint (R.50), shows on its face that Defendant attorney improperly abruptly withdrew from representation of one of the Plaintiffs, which is a violation of state substantive law. Defendant's unlawful withdrawal from representation of another Plaintiff is shown on the face of a motion to withdraw, Exhibit P-3 to the Complaint (R.37-38), which was filed in court, with a copy sent to Plaintiff by U.S. Mail.

The three clients were unaware at the time of each others' contracting with the attorney, and were only vaguely aware of their rights secured by the Rules of

Professional Conduct regulating attorneys and having the force and effect of substantive law in Louisiana². After analysis, Plaintiffs were prepared to allege, and did allege, that Defendants' actions were not mere technicalities or mistakes, but were fraudulent actions which also violated state substantive law.

Defendant attorney's extensive history of litigation against his own clients made it evident that Plaintiffs and their attorney would be sued and harassed in retaliation for filing their Complaint. The Defendant attorney did in fact file a defamation suit against the civil RICO Plaintiffs and their attorney on 3 March 2009 during the preparation of this Petition.³

As Plaintiffs pointed out to the Fifth Circuit panel at oral argument, the civil RICO Complaint was prepared and filed with the certainty that the Defendant would bring retaliatory satellite litigation, and Plaintiffs therefore appended a large amount of proof to their Complaint. The perceived threat of retaliatory litigation also caused Plaintiffs to consider the wording of their Complaint very carefully—trying to state a case sufficient under the statute and precedent without overstating the case.

Plaintiffs filed a RICO Case Statement on 19 December 2007 as required by the district court's RICO Standing Order entered in this case on 27 November 2007. The RICO Standing Order, Appendix

2. *Walker v. State*, 817 So.2d 57, 60 (La. 2002) citing *Leenerts Farms, Inc. v. Rogers*, 421 So.2d 216 (La. 1982) and *Husk v. Blancand*, 155 La. 816, 99 So. 610 (1924).

3. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS*, 2009-2267, Civil District Court for the Parish of Orleans, Louisiana, filed 3 March 2009, pending.

E, 8a-11a, has no indication of having been modified or updated since being ordered by the district court sitting *en banc* on 3 June 1987— twenty years before the instant case was filed— and consequently elicits a larger amount of information about immediate post-*Sedima* concerns and less about present concerns such as the Fifth Circuits extremely-heightened pleading standard. Plaintiffs' RICO Case Statement followed the outline dictated by the RICO Standing Order, and consequently contained the information elicited and omitted information not elicited.

Plaintiffs consented to an extension of time to respond, and Defendants filed a Rule 12(b)(6) motion to dismiss and for sanctions on 6 February 2008. Plaintiffs filed an opposition to the motion to dismiss on 25 February 2009 and asked for oral argument. Plaintiffs attached copies of four public records to their opposition for the purpose of rebutting Defendants' *res judicata* arguments, but did not try to improperly bolster their case with any new evidence, since the introduction of new evidence is not allowed in an opposition. In the written opposition, Plaintiffs indicated their intent and ability to amend.

In written opposition (R.508), as acknowledged by the district court at oral argument (R.665-67, Tr.50:13-52:2) Plaintiffs pointed out that not only was the alleged scheme fraudulent in a number of particulars, but that the totality of the scheme amounted to a deprivation of honest services under 18 U.S.C. §1346, Justifying Plaintiffs' contention that all of their money taken by Defendants should be recovered as damages.

The district court heard oral argument on 5 March 2008. During argument, the court asked (at R.461-62, Tr.26:19-27:3):

How does any of that equate to criminal fraud? That's my question. Can you explain that to me[?] Whether it violates the code of professionalism or the code of professional responsibility, if it does or doesn't, but assuming even if it does, how does that equate to criminal fraud? Remember, we're not talking about just a legal malpractice claim here. We're talking about civil RICO based on allegations that have to amount to criminal mail fraud under the criminal federal mail fraud statute. How does any of that amount to criminal mail fraud?

The district court also observed (at R.463, Tr.28:1-5):

Again, as I said, I'm not a big fan of that way of practicing law, frankly, but we're here talking about whether this equates in any way to a criminal act, and I just don't see it. I'm giving you a chance to convince me why this should survive a motion to dismiss.

At oral argument, Plaintiffs again identified their intent and ability to make a first amendment before responsive pleading to the Complaint. (R.656, Tr.41:16-20.)

At the conclusion of oral argument on 5 March 2008 the district court dismissed Plaintiffs' civil RICO claims with prejudice, dismissed Plaintiffs' pendant state law claims without prejudice, denied Defendants' motion for sanctions, and denied leave to amend. A minute entry was made that day, and was revised the next. A judgment was entered the next day on 6 March 2008.

In stating its reasons, the district court stated (at R.667, Tr.53:3-10):

Again, while it may be that the plaintiffs have at least a colorable argument that the defendants engaged at different times in different conduct which may or may not have violated provisions of either the code of professionalism or the code of professional responsibility, I don't believe that any of the conduct alleged in this case could in any way amount to federal mail fraud or wire fraud or a violation of the civil RICO statute based upon mail or wire fraud.

In reasons for denying amendment, the district court stated that the Complaint, RICO Case Statement, and written opposition had been three opportunities to make a best case, and then stated (at R.673, Tr.58:12-18):

I'm convinced that the plaintiffs have stated their best case. They've had three opportunities to do so. I think it would be pointless at this time to allow an amendment to the complaint, which is effectively what the RICO case statement does, gives you effectively a better chance to state your claim. So for those reasons, I'm going to deny leave to amend the complaint.

The decision here notwithstanding, where the RICO Case Statement was filed 49 days before the motion to dismiss, it was impossible to address in the RICO Case Statement any valid points in the motion to dismiss. Plaintiffs here had no more information on 19 December 2007 when the RICO Case Statement was due than they had on 20 November 2007 when they filed their Complaint. Therefore, the RICO Case Statement provided no meaningful opportunity to amend the Complaint, and does not generally provide such an amendment opportunity for civil RICO plaintiffs.

Petitioners are unaware of authority beyond the Fifth Circuit for treating a Rule 12(b)(6) opposition memorandum as an amendment itself.

Plaintiffs timely appealed to the Fifth Circuit as Number 08-30364. The Fifth Circuit panel heard oral argument on 3 December 2008 and filed a published per curiam opinion on 20 January 2009 (at 1a-5a).

The Fifth Circuit held “[b]ecause Appellants have not alleged the requisite predicate *criminal acts* under RICO, they have not met the pleading standard of Rule 12(b)(6)” (emphasis in the published opinion, at 3a).

The Fifth Circuit holds the following is not a cognizable civil RICO claim: allegation of the use of the mails and wires—with specific dates, senders, recipients, content, and fraudulent content, with documents appended—in furtherance of a fraudulent scheme perpetrated against three victims in overlapping succession, also violating several provisions of state law, such allegations factually supported by copies of contracts showing violations of state law on their faces, by copies of withdrawals showing violations of state law on their faces, by copies of billing statements showing recurring charges violative of state law on their faces, and by copies of documents showing the simultaneous use of multiple different law-firm identities, which is violative of state law.

Furthermore, under this precedential Fifth Circuit decision, the Rule 15(a) first amendment before responsive pleading as of (former) right is not available to plaintiffs who have filed a RICO Case Statement and a memorandum in opposition, with no discussion or consideration of undue delay, prejudice, futility, or any other factor formerly required to overcome the former presumption that amendment should be allowed.

The Fifth Circuit has created a fork with which to pitch most civil RICO complaints out of court: the civil complaint must meet an extremely-heightened ill-defined criminal-act standard, but it effectively may not be amended. The instant opinion has already been cited by the Eastern District of Texas and the Western District of North Carolina regarding the pleading standard, and by the Fifth Circuit regarding amendment.

CONTROLLING PRECEDENT

This Supreme Court has long observed that civil RICO has been put to use far beyond the harrying of movie mobsters, with such expanded use being warranted by the language of the legislation and this Court's consistent pronouncements since 1985. This Court has long observed that mail or wire fraud is a very common basis for civil RICO claims, that civil RICO does provide a federal-jurisdiction hook for otherwise state-law actions, and that the many jurists who disfavor civil RICO are instructed not to look outside of the statute and controlling precedent for new ways to limit its availability. This Court's recent unanimous decision in *Bridge v. Phoenix Bond and Indemnity Co.*⁴, which was released during the pendency of the appeal at issue here, makes clear that narrowing constructions of RICO, and judicial elimination of the private action, are not to be allowed.

There are remarkably few reported cases involving civil RICO complaints against attorneys related to their practice of law, as opposed to business dealings outside of legal practice. In drafting their Complaint, Plaintiffs were not able to identify any case from any circuit suggesting that a civil RICO claim against an

4. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. ____ (2008).

attorney had requirements different in any respect from other civil RICO claims. The leading case on-point is now the instant case, which teaches that in the Fifth Circuit it is impossible for any civil RICO suit against an attorney to be sustained if a state has adopted rules of professional conduct for attorneys or equivalent state law, because necessarily any attorney wrongdoing will be a simultaneous violation of state law to be litigated in the state courts.

REASONS FOR GRANTING THE PETITION

In the published opinion at issue here, the Fifth Circuit (1) requires “predicate criminal acts”— not indictable, not chargeable, not punishable, but criminal acts— to be alleged and apparently proven in order to avoid dismissal of a civil RICO complaint, (2) finds that a complaint (a) specifically alleging use of the mails and wires in furtherance of a scheme which also (b) violated several provisions of state law, to be categorically not actionable under civil RICO, and (3) limits and nearly eliminates the availability of amendment for these and future civil RICO plaintiffs.

- I. The Fifth Circuit’s “criminal act” pleading standard conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.**
- A. The Fifth Circuit imposed a heightened pleading standard in excess of Rules 8 and 9(b).**

The district court pressed Plaintiffs for evidence, before any discovery was had, of specific hours billed connected to proof of each specific hour not being worked, in order to avoid Rule 12(b)(6) dismissal. The

Fifth Circuit panel pressed Plaintiffs on the same point at oral argument. Requiring such proof at the pleading stage in a civil action goes far beyond any civil pleading standard known, and specifically is in conflict with *Bell Atlantic Corp. v. Twombly*⁵ and *Erickson v. Pardus*⁶ and the explication in those opinions of pleading standards under F.R.Civ.P. Rules 8 and 9(b).

As *civil* litigants, non-governmental civil RICO plaintiffs have no access to grand juries, search warrants, government investigators, or battering rams and seizures available to the government in building a RICO case. The availability of any evidence to attach to a civil RICO complaint is a matter of serendipity, and the availability of enough evidence to equal an indictment or bill of information before any discovery is had is so unlikely as to almost render the civil RICO remedy unavailable to non-governmental litigants in the Fifth Circuit.

The district court in the instant case (at R.657-58, Tr.42:25-43:9) made clear that the *Bell Atlantic Corp. v. Twombly* plausibility standard for Rule 12(b)(6) dismissal was being applied. The Fifth Circuit, in footnote 2, opined that Plaintiffs did not even meet the more liberal *Conley* standard, and that the applicability of the plausibility standard to RICO cases remains undecided.

B. The Fifth Circuit's demurring to apply the plausibility standard here conflicts with the Seventh Circuit.

The Seventh Circuit considered the civil RICO pleading standard in light of *Bell Atlantic Corp. v.*

5. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

6. *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*).

Twombly in *Limestone Development Corp. v. Village of Lemont, Ill.*⁷, holding that, for complaints involving complex litigation such as a RICO claim, a fuller set of factual allegations may be necessary to show that relief is plausible:

Bell Atlantic must not be overread. The Court denied “requir[ing] heightened fact pleading of specifics,” 127 S.Ct. at 1974; “a complaint ... does not need detailed factual allegations.” *Id.* at 1964. [...] A complaint must always, however, allege “enough facts to state a claim to relief that is plausible on its face,” *Bell Atlantic Corp. v. Twombly, supra*, 127 S.Ct. at 1974, and how many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary to show that the plaintiffs claim is not “largely groundless.” *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d Cir. 2008). If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).⁸

The Fifth Circuit’s reluctance to recognize the Supreme Court’s plausibility standard as applying to civil RICO cases, preferring instead to analyze civil RICO complaints in comparison to criminal RICO

7. *Limestone Development Corp. v. Village of Lemont, Ill.*, 07-1438 (7th Cir. 4/1/2008) 520 F.3d 797.

8. *Limestone Development*, 520 F.3d at 803-04.

complaints, is in conflict with the Seventh Circuit's clear endorsement of the plausibility standard.

II. The Fifth Circuit's dismissal of a civil RICO action alleging mail and wire fraud, which additionally alleged violations of rules and state law regulating attorneys, conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.

A. The Fifth Circuit's decision here conflicts with part III-C of *Bridge*, and the consistent line of prior decisions referenced therein.

The unanimous U.S. Supreme Court decision in *Bridge v. Phoenix Bond & Indemnity Co.*⁹ held that reliance is not a required element of a RICO claim predicated on mail fraud, and also addressed the policy argument whether extra-statutory limitations should be read into the RICO statute because civil RICO over-federalizes state law causes of action. The unanimous Supreme Court rejected that policy argument and pointed out that the Court has consistently rejected that argument since at least 1985, writing "[w]e have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe", the unanimous Court re-affirmed for today what it has been consistently affirming since at least 1985: Congress wrote the civil RICO statutes to have a broad reach, and only Congress can change the statutes.¹⁰

The Fifth Circuit here has devised a *sui generis*,

9. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. __ (2008).

10. *Bridge*, 553 U. S. __ (2008), slip opinion part "III-C" at 19-21.

loosely-defined pleading standard that almost all civil RICO plaintiffs— lacking governmental investigative and compulsory powers— will fail to meet. The Fifth Circuit's pleading standard functions as an extra-statutory limitation on the availability of civil RICO, as proscribed by the unanimous Supreme Court.

B. The Fifth Circuit's holding that an alleged civil RICO violation is categorically not actionable where it also implicates rules regulating attorneys conflicts with the Eighth Circuit.

The Fifth Circuit position in the instant case conflicts with the Eighth Circuit's *Handeen v. Lemaire*¹¹, holding that "[b]ehavior prohibited by §1962(c) will violate RICO regardless of the person to whom it may be attributed, and we will not shrink from finding an attorney liable when he crosses the line between traditional rendition of legal services and active participation in directing the enterprise. The polestar is the activity in question, not the defendant's status"¹².

III. The Fifth Circuit's rule formulaically justifying denial of amendment as of right conflicts with Rule 15(a), the decisions of this Court, and other circuit courts.

Under the well-settled teaching of *Foman v. Davis*¹³, federal courts in most of the nation observe a bias in favor of amendment written in F.R.Civ.P. Rule 15(a)— especially for a first amendment before responsive pleading, which is considered to be an amendment as

11. *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997).

12. *Handeen*, 112 F.3d at 1349.

13. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

of right or as a matter of course. Relying on its prior decision¹⁴ that affirmed denial of amendment where the district court *did* weigh and consider the factors of undue delay, dilatory motive, undue prejudice, repeated failure, and futility, the Fifth Circuit here affirms denial of a first amendment as of (former) right where the district court *did not* consider the above factors, but merely formulaically and automatically abrogated the right to amend because this was a civil RICO case in which a RICO Case Statement and an opposition memorandum had been filed.

Regarding amendment, the Fifth Circuit here is in conflict with Rule 15(a) and with *Foman v. Davis*.

A. The Fifth Circuit's opinion here has already been used as precedent for denial of amendment in a later decision.

The decision under scrutiny here has already been demonstrated to have importance beyond the mere denial of these three Plaintiffs' opportunity to present their case, because this decision has already been cited as precedent by a different panel of the same Fifth Circuit in justifying denial of leave to amend.¹⁵

The instant case marks the turning point where the Fifth Circuit dispenses with any pretense of analyzing delay, prejudice, futility, etc., and creates the judge-made rule that if one files a RICO case statement and an opposition to dismissal, as one must, then the former right under Rule 15(a) to make a first amendment before responsive pleading is forfeit.

14. *Price v. Pinnacle Brands, Inc.*, 97-10623 (5th Cir. 4/22/1998) 138 F.3d 602, 608.

15. *The Torch Liquidating Trust v. Stockstill*, 08-30404 (5th Cir. 2/23/2009).

B. The Fifth Circuit's rule here conflicts with the Seventh and Third and, apparently, with all other circuits.

The Fifth Circuit's rule here is inconsistent with the Seventh Circuit, which recently made clear that an order dismissing the original complaint normally does not eliminate the plaintiff's right to amend once as a matter of right, and observed that a district court's entering final judgment at the same time as granting a motion to dismiss (as happened in the instant case) constituted a loss of such right to amend.¹⁶

The Third Circuit's research for a 2006 decision found that "only one appellate court uncovered in our research has approved of denial of leave to amend based on a delay of less than one year"¹⁷, with that one court being the Fifth Circuit.

IV. Categorical dismissal of civil RICO actions against attorneys justified by reference to state rules or state laws regulating attorneys will lead to different results under different states' rules and laws.

Federal civil RICO actions based on federal mail and wire fraud statutes should have uniform application throughout the nation. The Fifth Circuit's treatment of a civil RICO mail and wire fraud action as being "at worst violations of the rules of professional responsibility" loosely implies that the wrongs in this instant case have an appropriate alternate remedy in Louisiana. The Fifth Circuit's approach would have

16. *Foster v. Deluca*, 05-1491 (7th Cir. 9/29/2008) 545 F.3d 582 (citing a number of prior Seventh Circuit cases).

17. *Arthur v. Maersk, Inc.*, 04-3670 (3rd Cir. 1/13/2006) 434 F.3d 196, 204.

different results where the wrongs occurred at least in part in other states having other regulatory regimes for attorneys, or having none at all. Ironically, in any future case involving truly nationwide fraud of unquestionably federal concern, the Fifth Circuit's approach would require a complex analysis of possibly all of the states' regulatory regimes, and would still very likely dismiss such a case categorically— simply for being a civil RICO action against an attorney.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

Mark Edw. Andrews

Counsel of Record

Andrews Arts & Sciences Law, LLC

7104 Coliseum St.

New Orleans, LA 70118-4818

504-865-8191

mea@mealaw.com

Attorney for Petitioners

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

Appendix A, Circuit Court Opinion	1a
Appendix B, District Court Order	6a
Appendix C, District Court Judgment	7a
Appendix D, RICO Standing Order	8a
Appendix E, Relevant Statutes	12a

APPENDIX A, CIRCUIT COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30364

Filed January 20, 2009
Charles R. Fulbruge III, Clerk

LESLEY SIMMONS ST. GERMAIN; HILLARY
ROSE HILLYER; MELISSA BRANIGHAN
LUMINAIS

Plaintiffs-Appellants

v.

D DOUGLAS HOWARD, JR.; D DOUGLAS
HOWARD, JR & ASSOCIATES; HOWARD & REED,
ATTORNEY AT LAW

Defendants-Appellees

Appeal from the United States District Court
Eastern District of Louisiana

Before GARWOOD, GARZA, and OWEN, Circuit
Judges.

PER CURIAM:

Plaintiff-Appellants Leslie St. Germain et al. ("Appellants") appeal the district court's dismissal of their civil Racketeer Influenced and Corrupt Organizations ("RICO") suit against Defendants-Appellees D. Douglas Howard and the two law firms with which he is affiliated ("Appellees"). Appellants

alleged violations of RICO and various state law claims arising out of Appellees' prior legal representation of Appellants. The district court dismissed Appellants' RICO claims with prejudice under FED. R. CIV. P. 12(b)(6), and dismissed the pendent state law claims without prejudice pursuant to its jurisdiction under 28 U.S.C. § 1367. The district court also denied Appellants leave to amend their complaint under Fed. R. Civ. P. 15(a) and taxed costs to Appellants.

We review de novo the dismissal of a complaint under FED. R. CIV. P. 12(b)(6), *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 371 (5th Cir. 2008), and review for abuse of discretion the district court's refusal to allow a party to amend its pleadings, taxing of costs to a party, and dismissal of pendent state law claims. See *Robertson v. Plano City*, 70 F.3d 21, 22 (5th Cir. 1995); 28 U.S.C. § 1367(c); *McLeod, Alexander, Powell & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1488 (5th Cir. 1990).

The district court did not err in dismissing Appellants' RICO claims under Rule 12(b)(6). Claims under RICO, 18 U.S.C. § 1962, have three common elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity. *Id.* The predicate acts can be either state or federal crimes. In their complaint, Appellants alleged that the predicate acts committed by Appellees were mail and wire fraud. However, the district court found, and Appellants acknowledged, that the "patterns of racketeering activity" they allege are at worst violations

of the rules of professional responsibility.¹ Because Appellants have not alleged the requisite predicate *criminal acts* under RICO, they have not met the pleading standard of Rule 12(b)(6).²

In holding that Appellants were required to demonstrate detrimental reliance when alleging injuries that resulted from fraud under RICO, however, the district court relied on Fifth Circuit precedent that is no longer good law. See *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2008). The Supreme Court recently held that no reliance requirement exists for civil causes of action under RICO for victims of mail fraud. *Bridge v. Phoenix*

¹The allegedly fraudulent acts that are at the heart of Appellants' RICO case involve the following: (1) violation by Appellees of multiple provisions of the Louisiana Rules of Professional Conduct; (2) Appellees using "multiple business identities" in the course of their legal representation of Appellants, as evidenced by billing statements sent from "Howard and Reed" and "Howard, Reed and Taylor, Attorneys at Law" (despite the existence of a contractual arrangement solely between "D. Douglas Howard and Associates" and Appellants); (3) Appellees charging Appellants non-refundable minimum fees in advance, and performing unauthorized and/or overbilled work; (4) Appellees engaging in unauthorized sharing of fees with parties not identified in the contract between Appellees and Appellants.

²The parties dispute which standard of pleading applies to civil RICO claims in this case. Appellants argue that the pleading standard articulated in the Supreme Court's decision in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007), is applicable to civil RICO claims. *Twombly* jettisoned the minimum notice pleading requirement of *Conley v. Gibson*, 355 U.S. 41 (1957), and instead required that a complaint allege enough facts to state a claim that is plausible on its face. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Appellees contend that *Twombly* is not relevant to civil RICO actions. Because Appellants do not meet either the more liberal *Conley* standard or the *Twombly* plausibility standard, we do not need to decide in this instance whether *Twombly* applies in the RICO context.

Bond & Indem. Co., 128 S.Ct. 2131, 2139-40 (2008). Thus, to the extent that our prior cases are in conflict with *Bridge*, they are overruled.

Notwithstanding the fact that reliance is no longer required to be pled, Appellants have still not sufficiently pled the predicate acts of mail and wire fraud, and are unable to show that they were injured by a violation of RICO. The district court's dismissal of the RICO claims under Rule 12(b)(6) was therefore ultimately proper. For this reason, the district court also did not err in dismissing Appellants' state law claims. The district court has discretion to dismiss pendent state law claims, and may decline to exercise supplemental jurisdiction over such claims where it has dismissed claims over which it had original jurisdiction. 28 U.S.C. § 1367(c).

Finally, the district court did not commit error in denying Appellants the opportunity to amend their complaint and in taxing costs to Appellants. Appellants had several opportunities to state their best case. See *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (finding no abuse of discretion in district court's denial of opportunity to amend when plaintiffs had already filed their original complaint, their RICO case statement, and their response to defendants' Rule 12(b)(6) motion). The district court also did not abuse its considerable discretion in taxing costs to Appellants. FED. R. CIV. P. 54(d); see *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1488 (5th Cir. 1990).

Appellees have moved under Rule 38 for sanctions and double costs and attorney's fees to be assessed against Appellants. The Court may assess sanctions and single or double costs and attorney's fees against a party if their appeal is deemed frivolous. Under Rule 38, "a frivolous appeal is an appeal in which 'the result

is obvious or the arguments of error are wholly without merit.” *Buck v. United States*, 967 F.2d 1060, 1062 (5th Cir.1992). Though this is a close case given that Appellants clearly have not presented a cognizable civil RICO claim, we decline to assess sanctions and double costs and attorney’s fees against Appellants.

For the foregoing reasons, we AFFIRM the judgment of the district court, and DENY the motion for sanctions and double costs and attorney’s fees.

APPENDIX B, DISTRICT COURT ORDER

MINUTE ENTRY

BARBIER, J.

MARCH 5, 2008

JS-10: 1hr.,30 mins.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

LESLEY SIMMONS ST. GERMAIN, ET AL
VERSUS

D. DOUGLAS HOWARD, ET AL

CIVIL ACTION
NUMBER: 07-9040
SECTION: J

COURTROOM DEPUTY: EILEEN STENSRUD
COURT REPORTER: CATHY PEPPER

REVISED MINUTES - March 6, 2008
WEDNESDAY, MARCH 5, 2008 9:30 A.M.
JUDGE CARL J. BARBIER PRESIDING

DEFENDANT'S MOTION TO DISMISS (15)

Argued.

ORDERED GRANTED in part. The federal claims are dismissed with prejudice; the pendant state court claims are dismissed without prejudice.

ORDERED DENIED in part as to the motion for sanctions; court costs are to be paid by the plaintiffs. Plaintiff's motion to amend the complaint: ORDERED DENIED.

Judgment to be issued.

ATTORNEYS: Mark Andrews, Esq., for plaintiff
Joanne Rinardo, Atty at Law, for defendant

APPENDIX C, DISTRICT COURT JUDGMENT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

LESLEY SIMMONS ST. GERMAIN, ET AL

VERSUS

D. DOUGLAS HOWARD, ET AL

**CIVIL ACTION
NUMBER: 07-9040
SECTION: J**

JUDGMENT

Considering the court's ruling, rendered in open court on March 5, 2008,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, D. Douglas Howard, Jr., D. Douglas Howard, Jr. & Associates and Howard & Reed, Attorney at Law, and against plaintiffs, Lesley Simmons St. Germain, Hillary Rose Hillyer and Melissa Branighan Luminais, dismissing plaintiffs' federal Racketeer Influenced and Corrupt Organizations Act ("RICO") claim with prejudice and plaintiffs' pendant state law claims without prejudice, at plaintiffs' cost.

Dated at New Orleans, LA., this 6th day of MARCH, 2008.

s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE

APPENDIX D, RICO STANDING ORDER

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ST. GERMAIN, ET AL
VERSUS
HOWARD, ET AL

CIVIL ACTION
NO. 07-9040
SECTION: "J"

RICO STANDING ORDER

This case contains a Civil RICO claim, filed in this Court pursuant to 18 U.S.C. Sections 1961-1968. This Order has been designed to establish a uniform and efficient procedure for deciding RICO cases.

The plaintiff(s) shall file within 20 days of the entry of this order a RICO case statement (an original and one (1) copy). The statement shall include the facts plaintiffs rely upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Federal Rule of Civil Procedure II. In particular, the statement shall be in a form which uses the numbers and letters set forth below, unless filed as part of an amended and restated complaint (in which latter case, the allegations of the amended and restated complaint shall reasonably follow the organization set out below) and shall state in detail and with specificity the following information:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. Sections 1962(a), (b), (c), and/or (d). If you allege violations of more than one Section 1962 subsection, treat each as a separate RICO claim.
2. List each defendant and state the alleged misconduct and basis of liability of each defendant.
3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim allegedly was injured.

5. Describe in detail the pattern of racketeering activity or collection of an unlawful debt alleged for each RICO claim. A description of the pattern of racketeering activity shall include the following information:

(a) List the alleged predicate acts and the specific statutes allegedly violated;

(b) Provide the dates of the predicate acts, the participants in the predicate acts and a description of the facts surrounding each predicate act;

(c) If the RICO claim is based upon the predicate offenses of wire fraud, mail fraud, fraud in the sale of securities, or fraud in connection with a case under U.S.C. Title II, the "circumstances constituting fraud or mistake shall be stated with particularity," Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentation or omissions, and the identity of persons to whom and by whom the alleged misrepresentations or omissions were made;

(d) Describe whether the alleged predicate acts relate to the enterprise as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

(a) State the names of the individuals, partnerships, corporations, associations or other entities allegedly constituting the enterprise;

(b) Describe the structure, purpose, roles, function and course of conduct of the enterprise;

(c) State whether any defendants are employees, officers or directors of the alleged enterprise;

(d) State whether any defendants are associated with the alleged enterprise, and if so, how;

(e) State whether you allege that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise;

(f) If you allege any defendants to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State whether you allege and describe in detail how the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering activity.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. Section 1962(a), provide the following information:

(a) State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,

(b) Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. Section 1962(b), provide the following information:

(a) Describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise; and,

(b) State whether the same entity is both the liable "person" and the "enterprise" under Section 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. Section 1962(c), provide the following information:

(a) State who is employed by or associated with the enterprise;

(b) State whether the same entity is both the liable "person" and the "enterprise" under Section 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. Section 1962(d), describe in detail the alleged conspiracy;

15. Describe the alleged injury to business or property;

16. Describe the relationship between the alleged injury and violation of the RICO statute.

17. List the damages sustained by reason of the violation of Section 1962, indicating the amount for which each defendant allegedly is liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendant state claims, if any.

20. Provide any additional information you feel would be helpful to the Court in processing your RICO claim.

This order was adopted by the court en banc at its meeting of June 3, 1987. The court has further directed that it be entered in each RICO case at the time of filing.

LORETTA G. WHYTE, CLERK
By s/ Eileen Stensrud
Deputy Clerk

DATE ISSUED NOVEMBER 27, 2007

APPENDIX E, RELEVANT STATUTES

18 U.S.C. §1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: [...] section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), [...];

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

[...]

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

[...]

18 U.S.C. §1962. Prohibited activities

[...]

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies

[...]

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

[...]

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

129

No. 08-1296

FILED

MAY 21 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

**In The
Supreme Court of the United States**

LESLEY SIMMONS ST. GERMAIN,
HILLARY ROSE HILLYER, and
MELISSA BRANIGHAN LUMINAIS,

Petitioners,

versus

D. DOUGLAS HOWARD, JR.,
D. DOUGLAS HOWARD, JR. & ASSOCIATES,
and HOWARD & REED, ATTORNEYS AT LAW,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

DURIS L. HOLMES

Counsel of Record for Respondents

JOANNE P. RINARDO

On Brief

DEUTSCH, KERRIGAN & STILES, L.L.P.

755 Magazine Street

New Orleans, Louisiana 70130

Telephone: (504) 581-5141

QUESTIONS PRESENTED

1. Is a plaintiff's requirement to allege criminal activity in a RICO claim obviated by the plausibility standard enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007)?
2. Is a possible ethics violation a predicate act under a RICO claim?
3. Does a district court have discretion to deny amendment if to do so would be futile?

CORPORATE DISCLOSURE

Petitioners are D. Douglas Howard, Jr., D. Douglas Howard, Jr. & Associates, and Howard & Reed, Attorneys at Law. There are no parent corporations or publicly held companies owning 10% or more of Petitioners' stock.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	1
I. Relevant Facts	1
II. Procedural History	2
REASONS FOR DENYING THE PETITION	5
I. Petitioners' Requirement to Allege Predicate Acts to Avoid Dismissal of RICO Claim Not Changed by Plausibility Standard.....	6
A. U.S. Supreme Court Requires Identification of Predicate Acts to Maintain RICO Claim	6
B. Fifth Circuit Did Not Impose Heightened Standard For Pleading	8
C. Complaint Did Not Meet Plausibility Standard	10
II. Fifth Circuit's Decision Is Consistent with Civil RICO Statute and the Jurisprudence	13
A. Lack of Predicate Acts Makes Reliance Issue Moot	13
B. Alleged Ethics Violations Not Predicate Acts Under RICO	14
III. District Court Not Required to Allow Amendment if Futile	16

TABLE OF CONTENTS – Continued

	Page
A. District Court's Denial of Amendment Was Appropriate	17
B. Fifth Circuit Decision Does Not Con- flict With Other Circuits	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page
CASES	
<i>Advocacy Organization for Patients and Providers v. Auto Club Ins. Ass'n</i> , 176 F.3d 315 (6th Cir. 1999)	7
<i>Ahmed v. Rosenblatt</i> , 118 F.3d 836 (1st Cir. 1997), <i>cert. denied sub nom.</i> , <i>Ahmed v. Greenwood</i> , 522 U.S. 1148, 118 S.Ct. 1165 (1998).....	7, 10
<i>Allen Neurosurgical Associates, Inc. v. Lehigh Valley Health Network</i> , 2001 WL 41143 (E.D.Pa. Jan 18, 2001)	22
<i>Anderson v. Ayling</i> , 396 F.3d 265 (3d Cir. 2004).....	21, 22
<i>Arthur v. Maersk, Inc.</i> , 434 F.3d 196 (3d Cir. 2006)	21
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955 (2007).....	9, 11, 12, 13
<i>Bonton v. Archer Chrysler Plymouth, Inc.</i> , 889 F.Supp. 995 (S.D.Tex. 1995).....	9
<i>Bozeman v. Rochester Telephone Corp.</i> , 205 F.3d 1321 (2d Cir. 2000), <i>cert. denied</i> , 531 U.S. 850, 121 S.Ct. 124 (2000).....	23
<i>Bridge v. Phoenix Bond & Indem. Co.</i> , 128 S.Ct. 2131 (2008).....	13
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957).....	7, 11, 13
<i>Costello v. Norton</i> , 1998 WL 743710 (N.D.N.Y. Oct 21, 1998)	19
<i>Craighead v. E.F. Hutton & Co., Inc.</i> , 899 F.2d 485 (6th Cir. 1990)	7

TABLE OF AUTHORITIES – Continued

	Page
<i>Crestview Village Apartments v. U.S. Dept. of Housing and Urban Development</i> , 383 F.3d 552 (7th Cir. 2004)	16
<i>Dumas v. Major League Baseball Properties, Inc.</i> , 104 F.Supp.2d 1220 (S.D.Ca. 2000), <i>aff'd sub nom.</i> , <i>Chast v. Fleer/Skybox Intern.</i> , 300 F.3d 1083 (9th Cir. 2002)	23
<i>Dussouy v. Gulf Coast Inv. Corp.</i> , 660 F.2d 594 (5th Cir. 1981), <i>cert. denied</i> , 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 611 (1997)	17
<i>Feinstein v. Resolution Trust Corp.</i> , 942 F.2d 34 (1st Cir. 1991)	7
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227 (1962)	17
<i>Forkin v. Rooney Pace, Inc.</i> , 804 F.2d 1047 (8th Cir. 1986)	8
<i>Foster v. DeLuca</i> , 545 F.3d 582 (7th Cir. 2008)	20
<i>Fultz v. ABB Power T&D Co., Inc.</i> , 210 F.3d 374 (7th Cir. 1999), <i>cert. denied sub nom.</i> , <i>Fultz v. ABB Power T&D, Inc.</i> , 531 U.S. 1080, 121 S.Ct. 781 (2001)	22
<i>Handeen v. Lemaire</i> , 112 F.3d 1339 (8th Cir. 1997)	15
<i>Heden v. Hill</i> , 937 F.Supp. 1230 (S.D.Tex. 1996)	10
<i>Impac Warehouse Lending Group v. Credit Suisse First Bostn LLC</i> , 270 Fed.Appx. 570 (9th Cir. 2008)	12

TABLE OF AUTHORITIES – Continued

	Page
<i>In Re: Warner and Rando</i> , 05-B-1303 (La. April 17, 2009)	2
<i>Jepson, Inc. v. Makita Corp.</i> , 34 F.3d 1321 (7th Cir. 1994)	10
<i>Limestone Dev. Corp. v. Village of Lemont, Ill.</i> , 520 F.3d 797 (5th Cir. 1998)	11, 13
<i>Lorenz v. CSX Corp.</i> , 1 F.3d 1406 (3d Cir. 1993)	20
<i>Marriott Bros. v. Gage</i> , 911 F.2d 1105 (5th Cir. 1990)	19
<i>Matter of Southmark Corp.</i> , 88 F.3d 311 (5th Cir. 1996)	17
<i>McDonald v. Heaton</i> , 2006 WL 2090088 (W.D. Okla. Jul 25, 2006)	19, 23
<i>Meyer v. Foti</i> , 720 F.Supp. 1234 (E.D.La. 1989)	17
<i>Midwest Grinding Co., Inc. v. Spitz</i> , 976 F.2d 1016 (7th Cir. 1992)	8
<i>Mills v. Polar Molecular Corp.</i> , 12 F.3d 1170 (2d Cir. 1993)	7
<i>Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.</i> , 48 F.3d 1066 (8th Cir. 1995)	8
<i>Perlberger v. Perlberger</i> , 1997 WL 597955 (E.D. Pa. Sep 16, 1997)	19
<i>Price v. Pinnacle Brands, Inc.</i> , 138 F.3d 602 (5th Cir. 1998)	19
<i>RA Investments I, L.L.C. v. Deutsche Bank AG</i> , 2005 WL 1356446 (N.D. Tex. Jun 6, 2005)	19

TABLE OF AUTHORITIES – Continued

	Page
<i>Rothman v. Vedder Park Management</i> , 912 F.2d 315 (9th Cir. 1990)	8
<i>Scheidler v. National Organization for Women, Inc.</i> , 537 U.S. 393, 123 S.Ct. 1057 (2003), <i>rev'd and remanded on other grounds</i> , 547 U.S. 9, 126 S.Ct. 1264 (2006).....	7
<i>Sedima, S.P.R.L. v. Imrex Co., Inc.</i> , 473 U.S. 479, 105 S.Ct. 3275 (1985).....	6
<i>St. Germain v. Howard</i> , 556 F.3d 261 (5th Cir. 2009)	19
<i>Tel-Phonic Services, Inc. v. TBS Int'l, Inc.</i> , 975 F.2d 1134 (5th Cir. 1992).....	9
<i>U.S. ex rel. Fowler v. Caremark RX, L.L.C.</i> , 496 F.3d 730 (7th Cir. 2007)	22
<i>U.S. ex rel. Grubbs v. Kanneganti</i> , __ F.3d __, 2009 WL 930071 (5th Cir. Apr 8, 2009).....	12
<i>U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.</i> , 532 F.3d 496 (6th Cir. 2008)	11
<i>Word of Faith World Outreach Center Church, Inc. v. Sawyer</i> , 90 F.3d 118 (5th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1117, 117 S.Ct. 1248 (1997).....	19

STATUTES

18 U.S.C. §1962(c)	6
--------------------------	---

TABLE OF AUTHORITIES – Continued

	Page
RULES	
Sup. Ct. R. 10	24
Fed. R. Civ. Proc. 8(a)	12
Fed. R. Civ. Proc. 9(b)	9, 10, 11
Fed. R. Civ. Proc. 15(a)	16, 17, 21
MISCELLANEOUS	
Louisiana Code of Professional Responsibility	14

STATEMENT OF THE CASE

I. Relevant Facts

Petitioners are former clients of D. Douglas Howard, Jr. ("Howard"), an attorney known within the local community as a premiere divorce attorney who aggressively protects the interest of his clients. Howard represented Hillary Hillyer ("Hillyer") in 2005-2006, Lesley St. Germain ("St. Germain") in 2006, and Melissa Luminais ("Luminais") in 2007.¹ Although Howard achieved excellent results for all petitioners, they now make the ludicrous claim that his representation of them was "a pattern of racketeering."

Petitioners argue that possible ethics violations, such as requiring a retainer, charging a monthly \$20 or \$30 administrative fee to cover postage and copying costs, and withdrawing from representation in accordance with the terms of their contracts, are predicate acts sufficient to maintain a RICO claim because the actions violated "substantive state law."² The substantive law to which petitioners refer is the Louisiana Code of Professional Conduct. During oral argument before the Fifth Circuit, however, petitioners were unable to cite any jurisprudential support for their position that a possible ethics violation is a state or federal crime. Notably, complaints filed with the Louisiana Office of Disciplinary Council

¹ See R. at 5-6.

² See Petition for Writ of Certiorari, p. 5.

by one of the petitioners and another by their attorney have both been dismissed because there was no finding of even a single ethics violation. (See Dismissals attached as Appendix "A").³

II. Procedural History

This suit is the continuation of a vendetta against Howard by St. Germain stemming from a Suit on Open Account that he filed against her for unpaid fees.⁴ Howard obtained a default judgment on the Suit in Open Account after St. Germain and her current attorney, Mark Andrews, did not timely respond.⁵ St. Germain filed an untimely Answer and Defenses. St. Germain then tried to nullify the judgment against her but, because she had no legitimate grounds, the judgment stood and Howard collected his fees.⁶

St. Germain then sued Howard in Civil District Court, Parish of Orleans, alleging the exact claims of breach of contract and malpractice as in her Answer

³ Prior to the decision, all complaints, and the identity of the filer, to the LDC were confidential. However, in *In Re: Warner and Rando*, 05-B-1303 (La. April 17, 2009), the Louisiana Supreme Court held that the confidentiality rule imposed upon participants in an attorney disciplinary proceeding is unconstitutional.

⁴ See R. at 284-304.

⁵ See R. at 316.

⁶ See R. at 317-321.

to Suit on Open Account.⁷ Howard filed a Motion to Dismiss based upon *res judicata*.⁸ St. Germain's attorney, knowing the claims had been adjudicated, asked Howard on the day of the hearing if St. Germain could dismiss her Petition. Howard allowed St. Germain to withdraw the Petition and filed a Consent Motion to Dismiss Without Prejudice which was signed on September 8, 2007.⁹

But no good deed goes unpunished. Within months, Hillyer and Luminais, who are also former clients of Howard, joined St. Germain to file in federal court a Racketeer Influenced and Corrupt Organizations ("RICO") claim and various state law claims against Howard.¹⁰ Petitioners alleged that Howard is a racketeer who engaged in mail fraud and wire fraud because he required a retainer, charged an administrative fee, and withdrew his representation from two of the petitioners as per the terms of their contracts.¹¹ To keep these claims in perspective, the fees paid by each of the petitioners to Mr. Howard were \$6,500, \$7,653, and \$12,657.¹² Respondents filed a Rule 12(b)(6) Motion to Dismiss the RICO claim because the petitioners failed to allege the essential

⁷ See R. at 305-315, 323-331.

⁸ See R. at 339-342.

⁹ See R. at 348-349.

¹⁰ See R. at 7-64.

¹¹ See R. at 7-26.

¹² See R. at 42-48, 55-59.

elements of the claim, and the state claims on various other grounds.

During oral argument on respondents' Motion to Dismiss, the district court concentrated on the alleged predicate acts and alleged resulting injuries. Despite the district court's repeated request for specifics, petitioners' attorney was unable to identify a single predicate act but incredulously averred that an attorney's alleged violation of a fiduciary duty is a **criminal act**.¹³ Petitioners' counsel also argued that any breach of contract that involves the U.S. mail is a crime.¹⁴ Similarly, petitioners' counsel was unable to identify any actual damages incurred by petitioners resulting from the alleged RICO violations despite the district court's repeated requests to do so.¹⁵ After reviewing all pleadings and hearing oral argument, the district court correctly ruled that no predicate acts or actual injuries had been specifically pled and dismissed the RICO claim with prejudice.¹⁶ The district court noted that because petitioners could not identify a predicate act despite numerous opportunities to do so, it was pointless to allow them to amend their Complaint.¹⁷ The district court dismissed

¹³ See R. at 630-631, 644-645.

¹⁴ See R. at 631-632.

¹⁵ See R. at 635, 639-640, 646-648.

¹⁶ See R. at 613.

¹⁷ See R. at 672-673.

the pendant state law claims without prejudice and assigned costs to petitioners.¹⁸

Petitioners appealed to the Fifth Circuit, which affirmed the decision that is the subject of this Petition for Certiorari. Because the Fifth Circuit correctly applied the law to the facts at hand, certiorari should be denied.

REASONS FOR DENYING THE PETITION

Petitioners present several questions for review, as summarized above, concerning the standard of review for dismissing a RICO claim under Rule 12(b)(6) and the district court's discretion in denying amendment to a complaint. Respondent understands petitioners' desire to attract the attention of this Court with important-sounding issues, but this Court has already answered the questions presented and should not waste a precious writ when a case citation will suffice. The standard for dismissing a RICO claim has not changed, i.e. the petitioners must allege a predicate act and actual damages to avoid dismissal. Petitioners have done neither. Further, the district court has the discretion to deny amendment if such an amendment would be futile, which is the case here.

¹⁸ See R. at 613.

I. Petitioners' Requirement to Allege Predicate Acts to Avoid Dismissal of RICO Claim Not Changed by Plausibility Standard

Petitioners assert that the Fifth Circuit deviated from the decisions of other circuits by requiring that petitioners allege predicate acts to avoid dismissal of their RICO claim. Petitioners refer to this supposedly new standard as a "criminal act pleading standard." Petitioners, however, incorrectly confuse the essential elements that must be alleged to maintain a RICO claim with the accepted pleading standards prescribed by the Federal Rules of Civil Procedure. The Fifth Circuit's dismissal of the RICO action is consistent with the jurisprudence and law that dictates the standard for review and the level of specificity that must be pled in a Complaint.

A. U.S. Supreme Court Requires Identification of Predicate Acts to Maintain RICO Claim

Petitioners erroneously argue that the Fifth Circuit has created a "criminal act" pleading standard that conflicts with this and other courts. The Fifth Circuit has not created a new standard of pleading; rather, it required petitioners to follow established law. For over twenty years, this Court has required petitioners to show: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity in order to maintain a RICO claim. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481, 105 S.Ct. 3275 (1985); 18

U.S.C. §1962(c). Thus, the first step in reviewing a RICO claim is to determine whether a predicate act has been pled. See *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 400, 123 S.Ct. 1057 (2003), *rev'd and remanded on other grounds*, 547 U.S. 9, 126 S.Ct. 1264 (2006). The district court here correctly found that petitioners failed to allege a predicate act in either the Complaint or the RICO Standing Order and, for that reason, it was implausible that petitioners would prevail on their claims. This decision does not deviate from the decisions of other circuits.

Numerous other courts have dismissed RICO claims when there is no showing of predicate acts, even under the more lax pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). See *Ahmed v. Rosenblatt*, 118 F.3d 886 (1st Cir. 1997), *cert. denied sub nom.*, *Ahmed v. Greenwood*, 522 U.S. 1148, 118 S.Ct. 1165 (1998) (plaintiff did not plead mail and wire fraud with sufficient particularity to satisfy predicate acts requirement for civil claim under RICO); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir. 1991) (dismissing RICO complaint for failure to plead predicate acts with specificity); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170 (2d Cir. 1993) (petitioners failed to allege predicate act of mail and wire fraud); *Advocacy Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315 (6th Cir. 1999) (petitioners failed to sufficiently allege mail and wire fraud as predicate acts in support of RICO claims); *Craighead v. E.F. Hutton & Co., Inc.*, 899

F.2d 485 (6th Cir. 1990) (petitioners' claim fatally flawed by their failure to plead the basic elements of the alleged predicate acts of mail fraud with sufficient particularity); *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016 (7th Cir. 1992); *Forkin v. Rooney Pace, Inc.*, 804 F.2d 1047 (8th Cir. 1986) (RICO dismissal upheld because predicate acts not sufficiently pled); *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066 (8th Cir. 1995) (mail and wire fraud allegations were not made with sufficient specificity and RICO claim dismissed); and *Rothman v. Vedder Park Management*, 912 F.2d 315, 316-17 (9th Cir. 1990) (dismissing RICO claim for failure to sufficiently allege predicate acts of mail fraud and extortion). Thus, the Fifth Circuit correctly upheld the district court's dismissal of petitioners' RICO claim because petitioners failed to plead even a single predicate act much less a pattern of mail or wire fraud.

B. Fifth Circuit Did Not Impose Heightened Standard For Pleading

In their brief, petitioners attempt to mislead this Court by stating that their failure to identify hours billed but not worked by Howard was the reason that the RICO claim was dismissed.¹⁹ They further aver that the Fifth Circuit's requirement that petitioners plead predicate acts with specificity "goes far beyond

¹⁹ See Petition for Writ of Certiorari, p. 11.

any civil pleading standard known” and conflicts with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).²⁰ Despite petitioners’ claim, alleging the essential elements in a complaint of a RICO claim, or any other claim, is not a “matter of serendipity” as they state, but merely good lawyering.²¹ The Fifth Circuit applied the correct standard under the Federal Rules of Procedure and the relevant jurisprudence when it upheld the dismissal of petitioners’ RICO claim.

Predicate acts supporting a civil RICO claim, which are based on allegations of fraud, must meet the pleading requirements of Fed. R. Civ. Proc. 9(b). *Tel-Phonic Services, Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992) (Rule 9(b)’s particularity requirement “applies to the pleading of fraud as a predicate act in a RICO claim). Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind may be averred generally.” Fed. R. Civ. Proc. 9(b) particularity, at a minimum, requires a plaintiff to allege the time, place, and the contents of the representation upon which the fraud is based, as well as the identity of the person making the representation, and the objective of the fraud. *Tel-Phonic*, 975 F.2d at 1139; *Bonton v.*

²⁰ See Petition for Writ of Certiorari, p. 12.

²¹ See Petition for Writ of Certiorari, p. 12.

Archer Chrysler Plymouth, Inc., 889 F.Supp. 995, 1004 (S.D.Tex. 1995). Petitioners alleged numerous facts in their pleadings but none that alleged criminal activity by respondents.

In the civil RICO context, Rule 9(b) also requires petitioners to allege specifically how *each* act of mail or wire fraud furthered the fraudulent scheme, who caused what to be mailed or wired when, and how the mailing or wiring furthered the fraudulent scheme. *Heden v. Hill*, 937 F.Supp. 1230, 1243 (S.D.Tex. 1996). If predicate acts of fraud are not pled with the particularity required by Rule 9(b), civil RICO claims are subject to dismissal. *See e.g., Ahmed v. Rosenblatt*, 118 F.3d at 889 (failure to plead predicate acts of fraud with particularity is enough to justify dismissal of a civil RICO claim); and *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327-30 (7th Cir. 1994) (dismissal of a civil RICO claim was proper when plaintiff failed to allege the predicate acts of mail and wire fraud with the required particularity). Thus, requiring petitioners to plead the alleged acts of fraud with particularity conforms with the requirements of Rule 9(b). Petitioners did not meet this requirement and their RICO claim correctly was dismissed.

C. Complaint Did Not Meet Plausibility Standard

To resuscitate their dismissed claim, petitioners argue a moot point to divert this Honorable Court's

attention from the paucity of factual support for their RICO claim. They incorrectly aver that the Fifth Circuit's failure to apply the plausibility standard conflicts with the Seventh Circuit's decision in *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804 (5th Cir. 1998), which held that a complaint must include as much factual detail as may be requested to show the claim is plausible. Petitioners' argument is factually incorrect and irrelevant.

The district court here, in fact, did apply the plausibility standard when it determined that the Complaint failed to state an actionable RICO claim. The Fifth Circuit upheld this decision and noted that the Complaint did not meet either the plausibility standard stated in *Twombly* or the minimum notice requirement set forth in *Conley*:

Because Appellants do not meet either the more liberal *Conley* standard or the *Twombly* plausibility standard, we do not need to decide in this instance whether *Twombly* applies in the RICO context.

Petitioners have either missed the point entirely, or have chosen to ignore that the holding in *Twombly* did not alter their obligations under Rule 9(b) to plead all allegations of fraud with specificity. Other circuits have recognized this two-fold obligation to meet the more general plausibility standard **and** plead fraud with specificity. See *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496 (6th Cir. 2008) ("Such conclusory allegations are insufficient even

under the notice pleading of Rule 8(a), *Bell Atlantic Corp. v. Twombly*, much less the heightened standard of Rule 9(b) which applies to the conspiracy to commit fraud claim) (internal citations omitted); *Impac Warehouse Lending Group v. Credit Suisse First Bostn LLC*, 270 Fed.Appx. 570 (9th Cir. 2008) (“As Rule 9(b)’s express language requires a pleading alleging fraud to state specific facts, applying *Erickson*’s liberal pleading standard would be inappropriate in the instant case, regardless of whether this case involves the kind of “sprawling, costly and hugely time-consuming” litigation which generally triggers *Twombly*’s special pleading rule.).

This two-fold pleading requirement was recently further clarified by the Fifth Circuit who stated

In cases of fraud, Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later. We apply Rule 9(b) to fraud complaints with “bite” and “without apology,” but also aware that Rule 9(b) supplements but does not supplant Rule 8(a)’s notice pleading. Rule 9(b) does not “reflect a subscription to fact pleading” and requires only “simple, concise, and direct” allegations of the “circumstances constituting fraud,” which after *Twombly* must make relief plausible, not merely conceivable, when taken as true.

U.S. ex rel. Grubbs v. Kanneganti, __ F.3d __, 2009 WL 930071 (5th Cir. Apr 8, 2009).

In the present case, the district court found that petitioners' Complaint did not meet the *Twombly* plausibility standard. The Fifth Circuit did not address whether *Twombly*'s plausibility standard had to be applied because it found that the facts alleged in the Complaint did not even meet the more liberal standard of *Conley*. This does not conflict with the holding in *Limestone* and this absence of conflict among the circuits negates petitioners' reason for this Court's review.

II. Fifth Circuit's Decision Is Consistent with Civil RICO Statute and the Jurisprudence

A. Lack of Predicate Acts Makes Reliance Issue Moot

In its decision, the Fifth Circuit discussed that although the district court noted that detrimental reliance is an element of a RICO claim, reliance is no longer required in cases of fraud.²² See *Bridge v. Phoenix Bond & Indem. Co.*, 128 S.Ct. 2131, 2139-40 (2008). The Fifth Circuit held that because petitioners did not plead any predicate acts and had no evidence of actual damages, the lack of detrimental reliance was moot:

²² The district court did not find reliance or base its dismissal on the lack thereof; the district court dismissed the RICO claim because there were no alleged predicate acts and no proximate causation between the alleged fraud and any actual injury alleged by the petitioners.

Notwithstanding the fact that reliance is no longer required to be pled, Appellants have still not sufficiently pled the predicate acts of mail and wire fraud, and are unable to show that they were injured by a violation of RICO.

Thus, the issue of detrimental reliance is moot and its mention by the district court does not warrant this Court's review.

B. Alleged Ethics Violations Not Predicate Acts Under RICO

All of the so-called predicate acts alleged by petitioners are nothing more than possible ethics violations – not crimes. In fact, the Office of Disciplinary Counsel recently dismissed two complaints filed by one petitioner and another filed by her attorney-of-record, Mark E. Andrews, because the complained-of actions, which also form the basis for this RICO claim, did not violate the Louisiana Code of Professional Responsibility. (See Appendix "A").

To side-step this relevant fact, petitioners erroneously infer in their Brief that the Fifth Circuit played favoritism and found no predicate acts simply because the respondents are attorneys. Petitioners' unfounded inference is misleading and inflammatory. In support, they cite language from an Eighth Circuit case that is irrelevant here. Despite petitioners' assertion, the Fifth Circuit's dismissal does not conflict with the Eighth Circuit as the facts have nothing in

common and are, therefore, distinguishable. Indeed, petitioners' mere lifting of an isolated sentence from the holding in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997), does not create a "conflict."

In *Handeen*, Handeen had obtained a substantial monetary judgment from Lemaire for injuries Handeen sustained when Lemaire tried to kill him. Subsequently, Handeen sued Lemaire and his law firm for manipulating the bankruptcy system by creating fictitious debt for Lemaire in order to obtain a fraudulent discharge of Handeen's judgment. Handeen sued the law firm for RICO violations based upon its alleged participation in this fraudulent scheme. The district court dismissed the law firm on summary judgment but the appellate court reversed because there was sufficient evidence that the firm had participated in the operation or management of the RICO enterprise. The court then distinguished this from other cases in which attorneys merely provided advice, which did not bring them under the RICO definition of an "enterprise."

Thus, *Handeen* differs significantly from the case at hand because there was a finding of predicate acts and the only issue was whether the law firm had been an "insider" or "outsider" for purposes of determining their involvement in the management or operation of the RICO enterprise. In the present case, the RICO claim was dismissed because petitioners made no showing that predicate acts had been committed by respondents or that petitioners sustained any actual injury.

The occupation of the respondents was irrelevant to the holding and petitioners have supplied no facts to the contrary. The district court questioned respondents' counsel during oral argument as to when an ethics violation committed by an attorney would be a predicate offense. Howard's counsel noted that a predicate offense could be a subset of ethics violations. That is, an ethics violation by an attorney is a predicate offense only when the violation is also criminal. Petitioners have never accepted this distinction despite numerous courts' admonition on this point. Because there is no conflict between the circuits on the standard of proof required to maintain a RICO action against attorneys and/or a law firm, i.e. the need to show predicate acts, the Fifth Circuit's decision need not be reviewed by this Court, and certiorari should be denied.

III. District Court Not Required to Allow Amendment if Futile

Fed. R. Civ. Proc. 15(a) allows "[a] party [to] amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . ." Because a motion to dismiss is not a responsive pleading, petitioners were not required to seek leave to amend. Nonetheless, they never amended their Complaint even when its deficiencies were the focal point of respondents' Rule 12(b)(6) Motion to Dismiss. Instead, petitioners sought leave to amend at the conclusion of their oral argument on the Rule 12(b)(6) Motion to Dismiss. See *Crestview Village Apartments*

v. U.S. Dept. of Housing and Urban Development, 383 F.3d 552 (7th Cir. 2004) (final judgment dismissing case causes plaintiff to lose right to amend). Thus, their right to amend without leave had been waived. The district court exercised its discretion and properly denied petitioners' requested leave to amend as amendment would have been futile.

A. District Court's Denial of Amendment Was Appropriate

A trial court is required to give leave to amend "when justice so requires." Fed. R. Civ. Proc. 15(a); *Meyer v. Foti*, 720 F.Supp. 1234, 1239 (E.D.La. 1989). Whereas Fed. R. Civ. Proc. 15(a) "'evidences a bias in favor of granting leave to amend,' [such leave] is not automatic." *Matter of Southmark Corp.*, 88 F.3d 311, 314 (5th Cir. 1996), quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981), cert. denied, 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 611 (1997). In deciding whether to allow amendment, a district court "may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Id.* The grant or denial of an opportunity to amend is in the discretion of the court, but it would be abuse of discretion without any justifying reasons. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962). In the present case, the appellate court correctly found no abuse of discretion by the district court because it

stated its reasons, orally and in writing, for denying amendment.

The district court weighed the above factors and concluded that it would be futile to allow petitioners leave to amend because they had had three opportunities to state their best case and still could not articulate a plausible claim under RICO. Even during the oral argument, petitioners were unable to identify a single predicate act committed by any defendant or state how they had suffered any actual damages as result of the alleged violations. Counsel for petitioners admitted during the hearing that "[w]e tried to put everything that we had into the complaint. There was little else to add in the RICO Case Statement."²³ Instead of identifying criminal activity, petitioners merely continued to proffer the erroneous premise that a possible ethics violation is equivalent to a criminal act.

Petitioners incorrectly contend that the district court gave no reason for refusing them leave to amend. This contention is disingenuous because petitioners admit in their writ that the district court's written reasons stated that petitioners' repeated failure to allege a claim was why it denied leave to amend. The Fifth Circuit noted that petitioners had several opportunities to state their best case, found no abuse of discretion in the lower court's reasoning, and affirmed the district court's denial of petitioners'

²³ See R. at 636, T 21:21-25.

motion to amend. *St. Germain v. Howard*, 556 F.3d 261 (5th Cir. 2009) (citing *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (finding no abuse of discretion in district court's denial of opportunity to amend when petitioners had already filed their original complaint, their RICO case statement, and their response to respondents' Rule 12(b)(6) motion)).

Petitioners argue that they were never given an opportunity to amend and, thus, should have been allowed to do so. Notwithstanding that any amendment would have been futile, their argument is misleading because they filed a RICO Case Statement which several courts consider an amendment to the original Complaint and/or can be weighed in deciding a dispositive motion. *See Costello v. Norton*, 1998 WL 743710 (N.D.N.Y. Oct 21, 1998) (RICO Case Statement is an amendment of Complaint); *McDonald v. Heaton*, 2006 WL 2090088 (W.D. Okla. Jul 25, 2006); *Perlberger v. Perlberger*, 1997 WL 597955 (E.D. Pa. Sep 16, 1997) (RICO Case Statement treated as amendment); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1107 (5th Cir. 1990) (filing of RICO Case Statement allows consideration of claim without further amendment and Statement considered in motion for summary judgment); *RA Investments I, L.L.C. v. Deutsche Bank AG*, 2005 WL 1356446 (N.D. Tex. Jun 6, 2005) (RICO Case Statement was considered when dismissing RICO claim); *Price v. Pinnacle Brands, Inc.*, 138 F.3d at 605 (case statement considered in motion to dismiss); *Word of Faith World Outreach Center*

Church, Inc. v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996), *cert. denied*, 520 U.S. 1117, 117 S.Ct. 1248 (1997) (case statement reviewed in motion to dismiss); and *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993) (RICO Case Statement is a pleading to be considered when deciding motion to dismiss). Petitioners could have amended their Complaint anytime before judgment had been entered, but they did not.

As the district court correctly noted, after having numerous opportunities to amend their complaint, petitioners were unable to identify any predicate acts, much less a pattern of such acts, and could not specify any actual damages suffered by petitioners. Therefore, any further amendment would have been futile. The Fifth Circuit correctly affirmed the decision to deny amendment under these facts.

B. Fifth Circuit Decision Does Not Conflict With Other Circuits

Petitioners aver that this Court's review is warranted because the Fifth Circuit's denial of amendment conflicts with "all other circuits" and then cites two cases from the Third and Seventh Circuits in support. The Seventh Circuit case is clearly distinguishable. In *Foster v. DeLuca*, 545 F.3d 582 (7th Cir. 2008), the appellate court reversed the district court's denial of amendment because the district court gave no reasons for its decision. *Id.* at 585. Here, the district court denied the oral request to amend stating that petitioners had had several

opportunities to make their case, and amending would not cure their lack of factual support for the RICO claims. Indeed, in their appeal, petitioners still could not identify any criminal activity by respondents; rather, petitioners stated that they wanted to amend so that they could re-organize their complaint. However, no amount of re-organization can overcome the deficiencies inherent in their claim.

The Third Circuit case cited by petitioners is equally distinguishable. In *Arthur v. Maersk, Inc.*, 434 F.3d 196 (3d Cir. 2006), the district court denied petitioners request to amend an admiralty complaint to add the United States Navy as a defendant. The amendment would have related back to the original filing and revived what appeared to be a claim for which the statute of limitations had run. The district court denied amendment because the request had been delayed unduly because plaintiff should have known of the Navy's ownership of the vessel in question. The appellate court noted that the reasons given made it clear that the district court had applied the requisites for relating back under Rule 15(c) instead of the Rule 15(a) requirements for amendment. Futility of amendment was never at issue in *Arthur*, and the case has no relevance to the issues at hand.

In fact, petitioners' averment that the Fifth Circuit's holding conflicts with the Third Circuit is undercut by *Anderson v. Ayling*, 396 F.3d 265 (3d Cir. 2004). In *Anderson*, two union members alleged a RICO violation against union activists. The district

court dismissed the RICO claim with prejudice finding no direct injury resulted from the alleged acts and did not allow them to amend the complaint. The appellate court upheld the lower court's dismissal and denial of amendment. The appellate court agreed that the amendment would be futile as petitioners could not allege facts sufficient to show causation of injury.

In addition, petitioners' claim that the Fifth Circuit's decision conflicts with "all other circuits" is factually incorrect. For example, in *Allen Neurosurgical Associates, Inc. v. Lehigh Valley Health Network*, 2001 WL 41143 (E.D.Pa. Jan 18, 2001), a case much more on point than the two cited by petitioners above, the Court denied petitioners' motion to amend a RICO complaint because, as here, plaintiff had an opportunity to refine his Complaint by filing a RICO Case Statement in addition to the Complaint. The *Allen* Court stated that "granting leave to amend would be futile because plaintiff's claims are essentially state claims that are not predicate acts of racketeering under RICO." The same reasoning was applied here with the same correct result. See also *U.S. ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730 (7th Cir. 2007) (amendment denied because allegations of fraud not pled with specificity making amendment would be futile); *Fultz v. ABB Power T&D Co., Inc.*, 210 F.3d 374 (7th Cir. 1999), cert. denied sub nom., *Fultz v. ABB Power T&D, Inc.*, 531 U.S. 1080, 121 S.Ct. 781 (2001) (amendment denied as futile); *Anderson v. Ayling*, 396 F.3d 265 (amendment of RICO claim denied as

futile); *Bozeman v. Rochester Telephone Corp.*, 205 F.3d 1321 (2d Cir. 2000), *cert. denied*, 531 U.S. 850, 121 S.Ct. 124 (2000) (given information provided in RICO Case Statement, district court denial of amendment, because it would have been futile, was not abuse of discretion); *McDonald v. Heaton*, 2006 WL 2090088 (lack of facts in RICO Case Statement to support claim demonstrates that amendment would be futile); *Dumas v. Major League Baseball Properties, Inc.*, 104 F.Supp.2d 1220 (S.D.Ca. 2000), *aff'd sub nom.*, *Chast v. Fleer/Skybox Intern.*, 300 F.3d 1083 (9th Cir. 2002) (court denied leave to amend where petitioners failed to allege actual injury or "even a scintilla of fraudulent conduct by Respondents"). The Fifth Circuit correctly upheld the district court's denial of leave to amend because that ruling was not an abuse of discretion under the facts at hand.

CONCLUSION

Petitioners' petition states no compelling reason why this Court should grant a writ of certiorari. The decision of the Fifth Circuit does not conflict with a decision of another court of appeal, has not decided an important federal question that conflicts with a decision of the Louisiana Supreme Court, and has not in any way deviated from accepted judicial proceedings as to warrant this Court's supervision. To the contrary, the Fifth Circuit's opinion analyzed every issue under the correct legal standard of review. Petitioners simply did not, and could not, allege any

criminal acts by respondents or actual injuries suffered by petitioners. That failure mandated dismissal of their RICO claim. Also, the Fifth Circuit correctly found that because petitioners had three opportunities to allege a crime and could not, the district court correctly exercised its discretion by denying petitioners' leave to amend.

Petitioners' dissatisfaction with the Fifth Circuit's decision does not warrant review by this Court: "A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."²⁴

Respectfully submitted,

DURIS L. HOLMES (#17629)

Counsel of Record for Respondents

JOANNE P. RINARDO

On Brief

DEUTSCH, KERRIGAN & STILES, L.L.P.

755 Magazine Street

New Orleans, Louisiana 70130

Telephone: (504) 581-5141

Facsimile: (504) 566-1201

Counsel for Respondents

²⁴ Rule 10 of the Rules of the Supreme Court.

3

Supreme Court, U.S.
FILED

JUN 1 - 2009

OFFICE OF THE CLERK

No. 08-1296

In the
Supreme Court of the United States

LESLEY SIMMONS ST. GERMAIN;
HILLARY ROSE HILLYER;
MELISSA BRANIGHAN LUMINAIS,

Petitioners,

v.

D DOUGLAS HOWARD, JR;
D DOUGLAS HOWARD, JR & ASSOCIATES;
HOWARD & REED, ATTORNEYS AT LAW,

Respondents.

*On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

PETITIONERS' REPLY BRIEF

MARK EDW. ANDREWS
Counsel of Record
ANDREWS ARTS & SCIENCES LAW, LLC
7104 COLISEUM STREET
NEW ORLEANS, LA 70118-4818
MEA@MEALAW.COM
504-865-8191

Attorney for Petitioners

DISCLOSURE

There is no change in Petitioners' disclosure made in the Petition.

TABLE OF CONTENTS

Table of Authorities	ii
I. Respondents endorse the Fifth Circuit's misapprehension that some other crime in addition to mail and wire fraud must be shown.	1
II. Respondents rehearse the elements of a civil RICO cause of action based on fraud, but fail to justify the Rule 12(b)(6) dismissal here.	3
III. Conflict between Eighth and Fifth Circuits on attorney misconduct exists regardless of any difference in fact patterns.	3
IV. Respondents misapprehend the issue of first amendment before responsive pleading as a matter of course, where the Fifth Circuit's policy conflicts with controlling jurisprudence and the other circuits.	4
V. Other misstatements by Respondents.	8
VI. Pending collateral litigation.	9
VII. <i>Ashcroft v. Iqbal</i> opinion, the pleading standard, and amendment.	9
VIII. Conclusory statements are a necessary starting point, and should be read together with supporting detail in the complaint.	10
Conclusion	12

TABLE OF AUTHORITIES

Cases

<i>Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network</i> , 99-cv-04653 (EDPA 2001)	6
<i>Anderson v. Ayling</i> , 04-1180 (CA3 1/24/2005)	6
396 F.3d 265	6
<i>Ashcroft v. Iqbal</i> , 07-1015, 556 U. S. __ (5/18/2009)	9, 10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955 (2007)	10
<i>Bridge v. Phoenix Bond & Indemnity Co.</i> , 553 U.S. __, 128 S.Ct. 2121 (2008)	2
<i>Crowe v. Smith</i> , 96-30851 (CA5 8/12/1998)	2
151 F.3d 217	2
<i>D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS</i> , 09-3450, USDC, EDLA, removed 5 May 2009, pending	9
<i>Foster v. Deluca</i> , 05-1491 (CA7 9/29/2008)	7
545 F.3d 582	7
<i>Handeen v. Lemaire</i> , 95-3679 (CA8 5/7/1997)	4
112 F.3d 1339	4
<i>Lorenz v. CSX Corp.</i> , 92-3667, 92-3694 (CA3 8/6/1993)	6
1 F.3d 1406	6

Rules

Federal Rule of Civil Procedure 8	9, 11
Federal Rule of Civil Procedure 9	3, 9
Federal Rule of Civil Procedure 10	11
Federal Rule of Civil Procedure 12	12
Federal Rule of Civil Procedure 15	12

State Substantive Law

Louisiana Rules of Professional Conduct (2006)	2, 8
--	------

PETITIONERS' REPLY BRIEF

Petitioners seek review of the Fifth Circuit's decision (1) affirming dismissal of a civil RICO case at the pleading stage "[b]ecause Appellants have not alleged the requisite predicate *criminal acts*", and (2) affirming denial of a first amendment as of right without any consideration of undue delay, dilatory motive, undue prejudice, repeated failure, or futility.

I. Respondents endorse the Fifth Circuit's misapprehension that some other crime in addition to mail and wire fraud must be shown.

The Fifth Circuit correctly observed that "[i]n their complaint, Appellants alleged that the predicate acts committed by Appellees were mail and wire fraud", but then the Fifth Circuit stated that the allegations "are at worst violations of the rules of professional responsibility", and that "Appellants have not alleged the requisite *criminal acts*". (Emphasis in published opinion below at Pet.2a-3a.) Mail and wire fraud evaporated over the course of three sentences.

Respondents (Opp.16) reveal the fundamental error of their support of the Fifth Circuit's "criminal act" pleading standard for civil RICO, stating "[t]hat is, an ethics violation by an attorney is a predicate offense only when the violation is also criminal". This is wrong. In this case the predicate acts are mail and wire fraud. There is no requirement for showing yet another level of criminality— fraud is enough.

In order to sufficiently allege mail and wire fraud, a plaintiff needs to particularly identify what was wrong about the fraudulent statements. State substantive law governing attorney conduct comes into play here.

It is wrong for an attorney to abruptly and prejudicially withdraw from representation of client after client, using threats of such abrupt and prejudicial withdrawal as a means of extorting clients. It is wrong for a law firm with no relationship to a client to take money from client after client. It is wrong for a law firm to operate under more than one law-firm name. It is wrong for an attorney to share fees with any attorney or firm in the absence of disclosure and approval by the client. It is wrong for an attorney to overbill and overcharge client after client. All of this was alleged with specificity and supported with evidence attached to the Complaint.

Without reference to the rules governing attorneys, a plaintiff might have to trace everything back to first principles. Louisiana has Rules of Professional Conduct. Those Rules are a close copy of the American Bar Association Model Rules, and are substantially the same rules as may be found throughout the United States. They define attorney wrongdoing. When the government is enforcing those rules, the proceeding is considered to be quasi-criminal.¹

In *Bridge v. Phoenix Bond & Indemnity Co.*², the predicate acts were mail fraud where the perpetrators also violated a county's administrative, *non-criminal* "Single, Simultaneous Bidder Rule". Neither the civil RICO statutes nor the controlling jurisprudence require the additional level of criminality required by the Fifth Circuit here and endorsed by the Respondents.

Respondents (Opp.9) misunderstand Petitioners' point (Pet.12) that "[t]he availability of any evidence to attach to a civil RICO complaint is a matter of serendipity", where Petitioners are pointing out that

1. *Crowe v. Smith*, 96-30851 (CA5 8/12/1998) 151 F.3d 217, 229.

2. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. __ (2008)

the investigative and coercive powers of the government are not available to non-governmental civil litigants, and are clearly addressing issues of *fact* and *proof*.

II. Respondents rehearse the elements of a civil RICO cause of action based on fraud, but fail to justify the Rule 12(b)(6) dismissal here.

Respondents, starting at Opp.6, list the elements of a civil RICO claim and then list a number of citations proving that some civil RICO cases get dismissed. Then Respondents list the elements of fraud and explain how fraud must be pleaded with particularity, followed by citations to cases where fraud was inadequately alleged. Respondents do not address the question whether the triggering of Rule 9(b) for allegations of fraud does or does not oblige a plaintiff to plead even the non-fraud elements of a claim with Rule-9 specificity. Respondents' treatment here is not useful.

Petitioners have pointed out (Pet.3-4) where all of the specific information required by Rule 9(b) is to be found in the Complaint. Petitioners did specifically allege time, place, contents, identity, and objective. They did specifically allege who, what, when, and how. Respondents explain the Rule 9(b) requirement, but do not explain how Petitioners have supposedly failed to meet the requirement.

III. Conflict between Eighth and Fifth Circuits on attorney misconduct exists regardless of any difference in fact patterns.

Petitioners cited *Handeen v. Lemaire* for the proposition that, in the Eighth Circuit, an attorney participating in the direction of a RICO enterprise violates the RICO statutes and the Eighth Circuit "will

not shrink from finding an attorney liable"³, in contrast with the policy implied by the very short Fifth Circuit opinion here— that allegations which are plausible as ethics violations are categorically not cognizable as civil RICO predicate acts, notwithstanding proven use of the mails and wires. The categorical disparity of treatment of attorney wrongdoing is therefore a conflict between the Eighth and Fifth Circuits. Respondents' attempts (Opp.14-16) to distinguish the *Handeen* case are ill-considered, and their contention (Opp.14) that Petitioners infer that the Fifth Circuit "played favoritism" is offensive.

IV. Respondents misapprehend the issue of first amendment before responsive pleading as a matter of course, where the Fifth Circuit's policy conflicts with controlling jurisprudence and the other circuits.

Beginning at Opp.16, Respondents misstate the record several times regarding amendment of the complaint. Petitioners did state their intent and ability to amend in writing (R.509) and orally (R.656, Tr.41:16-20). The district court did not issue any written reasons, only oral reasons. The district court's oral reasons for denying amendment (R.672-73, Tr.57:14-58:18) did not consider undue delay, dilatory motive, undue prejudice, repeated failure, or futility, but formulaically recited the filing of a RICO case statement and an opposition to dismissal.

The Fifth Circuit affirmed the denial of a first amendment as of right with the following one-sentence analysis: "Appellants had several opportunities to state their best case". (Opinion below at Pet.4a.)

3. *Handeen v Lemaire*, 112 F.3d 1339, 1349 (CA8 1997).

Respondents misstate the record (Opp.18) where they state that the district court gave oral and written reasons for denying amendment. The district court only made an oral statement of reasons. Respondents continue to misstate the record (Opp.18) claiming "[t]he district court weighed the above factors"—referring to undue delay, dilatory motive, undue prejudice, repeated failure, and futility—when in fact the record shows that neither the district court nor the circuit court ever even mentioned those factors.

Respondents cite several cases (Opp.17-20) showing the Fifth Circuit's consistent policy to restrict amendment of pleadings, especially in civil RICO cases, but Respondents' cases support this Petition by further showing that this case is not an isolated error and is a legitimate test of the policy of the Fifth Circuit which is in conflict with controlling jurisprudence and (apparently) every other circuit.

Respondents (Opp.19-20) cite several cases teaching that a RICO case statement is considered in deciding a motion to dismiss. Those cases are inapposite here, where the issue is denial of amendment. Respondents do show that some jurisdictions require the RICO case statement months later than the twenty-something days after filing here, often after motions and amendments. Petitioners have already pointed out (Pet.5,8) that they knew nothing more when they filed their RICO Case Statement than they did twenty-nine days earlier when they filed the Complaint.

Respondents' two featured cases in attempted support of their contention that "several courts" consider the RICO case statement to be an amendment to the complaint which justify denial of amendment fail to

support that contention. Both the Third-Circuit case⁴ (Opp.20) and the Eastern Pennsylvania case⁵ (Opp.22) involved complaints which were allowed to be amended once or twice, where the RICO case statements were not required until many months after initial filing, and where second and third amendments were denied after full consideration of undue delay, dilatory motive, undue prejudice, repeated failure, and futility. Respondents' featured cases fail to support their contentions, as do their string-cited cases on pages 19-23. Instead, they support Petitioners' contention that no other circuit but the Fifth formulaically restricts the first amendment as of right of a civil RICO complaint, and they show that other jurisdictions provide for the filing of RICO case statements significantly later than the twenty-something days after initiation required here.

Respondents (Opp.21) mistakenly cite *Anderson v. Ayling*⁶ in attempted support of their contention that the Third Circuit denies the making of a first amendment as a matter of course. The PACER docket for EDPA Case No. 02-cv-2352 shows that the complaint was amended eight months after filing and that the RICO case statement was timely filed at nine months after filing of the complaint. The Third Circuit reviewed and affirmed the district court's finding that *further* amendment would be futile, and said nothing about any RICO case statement.

On their Opp.20, Respondents try to distinguish Petitioners' cited Seventh Circuit case *Foster v. Deluca*, but that opinion clearly states that in the Seventh Circuit

4. *Lorenz v. CSX Corp.*, 92-3667, 92-3694 (CA3 8/6/1993) 1 F.3d 1406.

5. *Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network*, 99-cv-04653 (EDPA 2001).

6. *Anderson v. Ayling*, 04-1180 (CA3 1/24/2005) 396 F.3d 265.

"[d]istrict courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint",⁷ which is exactly the opposite of the denial of amendment and the immediate termination affirmed by the Fifth Circuit in the instant case, and confirms a circuit-split.

Respondents' contention (Opp.16) that the "focal point" of their motion to dismiss should have provoked an amendment of the Complaint is false— their motion had no focal point. Respondents, as Defendants, filed a 53-page memorandum with their motion to dismiss and for sanctions (R.353-405) which was more than double the 25-page limit under the local rules, and it had 66 pages of "evidence", mostly state-court filings, attached (R.407-471). Among the scattershot presentation of grounds for dismissal, including *res judicata*, *vendetta*, the Fifth Circuit's (former) reliance requirement, contracts purportedly legalizing all wrongful actions, and demands for sanctions, it can be argued in retrospect that Respondents did touch upon the grounds actually used by the district court in dismissing the case. But Petitioners' opposition memorandum was required to respond to all of Respondents' arguments for dismissal, not just to the page that ended up containing the lucky guess. For the district court to have deemed the opposition memorandum the equivalent of an amendment is doubly in error because the opposition had to respond to a rambling, oversized motion, and because it would be incorrect procedure for a plaintiff to have attempted to file an amended pleading in the form of an opposition memorandum.

7. *Foster v. Deluca*, 05-1491 (CA7 9/29/2008) 545 F.3d 582, 584.

V. Other misstatements by Respondents.

Respondents state the amount of money taken from each victim, the Petitioners here. (Opp.3.) Respondents' figures are too low— damages total \$31,407.38. After acknowledging on page 3 these amounts of money taken from each Petitioner, Respondents then contend on pages 4, 5, 13, and 24 that Petitioners failed to allege any actual injury required for civil RICO standing.

Respondents misrepresent Petitioners' arguments in the Petition and before the courts below. Respondents downplay the Louisiana Rules of Professional Conduct, and never once refer to them by their correct name. Respondents downplay their actions as "possible ethics violations" and do not even acknowledge the ten-dollar-per-month-per-victim flat-out fraudulent overbilling that Petitioners both alleged and proved in the Complaint (R.14). Petitioners point out that "possible ethics violations" are *plausible* ethics violations.

On pages 8, 14, and 19, Respondents accuse Petitioners of misleading this Supreme Court, and on page 18 they accuse Petitioners of being disingenuous. Petitioners deny the accusations.

Respondents' characterizations on pages 4, 16, and 18 concerning Petitioners' attorney's oral statements to the courts below are inaccurate.

Respondents' allegation of "vendetta" and discussion of state-court litigation and disciplinary proceedings on pages 1-3 is irrelevant and inaccurate.

On page 13 Respondents state that the district court did not base dismissal of the civil RICO action on a lack of an allegation of reliance, which is wrong because the district court did (R.668-69, Tr.53:6-54:23) and the circuit court recognized it (Opinion below at Pet.3a-4a).

VI. Pending collateral litigation.

The attorney who is a Respondent here filed a collateral retaliatory attack on the dismissed civil RICO claims in a state-court action for defamation, naming Petitioners here, their attorney, and a Petitioner's father as defendants.⁸ After the filing of this Petition, and after Petitioners here counterclaimed the state-law claims formerly pendant to the civil RICO claim, Respondent filed a bolstered amended complaint, which made the action removable and then transferable as a related case, with the result that Respondent's collateral attack and the counterclaims are now before the same division of federal district court that dismissed the civil RICO claims at issue here.⁹

VII. *Ashcroft v. Iqbal* opinion, the pleading standard, and amendment.

Ashcroft v. Iqbal,¹⁰ recently decided, examines the interplay among Rules 8 and 9(b) and the plausibility standard— all at issue in the instant Petition. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a

8. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons*, DDS, 2009-2267, Civil District Court for the Parish of Orleans, Louisiana, filed 3 March 2009, removed.

9. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons*, DDS, 09-3450, U.S. District Court for the Eastern District of Louisiana, removed 5 May 2009, pending.

10. *Ashcroft v. Iqbal*, 07-1015, 556 U. S. __ (5/18/2009)

court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”¹¹ Here, factual allegations with supporting documentation were pleaded, and their veracity should have been assumed.

*Twombly*¹² “expounded the pleading standard for ‘all civil actions’”,¹³ and the Fifth Circuit’s not recognizing the *Twombly* plausibility standard in dismissal of this civil RICO action conflicts with controlling precedent and other circuits.

Petitioners point out that this Court in *Ashcroft v. Iqbal* ordered that the courts below should consider the issue of leave to amend the deficient complaint,¹⁴ recognizing the right to amend which was denied to Petitioners here.

VIII Conclusory statements are a necessary starting point, and should be read together with supporting detail in the complaint.

Respondents, in part I of their brief, approve of the courts below analyzing isolated statements in the Complaint and finding them conclusory and therefore dismissable. This Court recently observed that “legal conclusions can provide the framework of a complaint”, even though “they must be supported by factual allegations”.¹⁵ Petitioners would push the analysis one step more and suggest that legal conclusions *must* provide the framework of a complaint

11. *Ashcroft v. Iqbal*, slip op. at p.15.

12. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

13. *Ashcroft v. Iqbal*, slip op. at p.20.

14. *Ashcroft v. Iqbal*, slip op. at p.23.

15. *Ashcroft v. Iqbal*, slip op. at p.15.

in order to comply with Rule 8, which requires that a defendant be put on notice in short and plain language of what the complaint is about, and such language will necessarily be conclusory. If Rule 10 requiring separate paragraphs is considered, then the propriety of drafting complaints which start with short-and-plain conclusory statements supported in separate paragraphs by increasing levels of factual allegation is obvious. Here, Petitioners filed a Complaint which contained several conclusory statements, but every one of those statements was supported by allegations of specific facts, and with documentary evidence attached to the Complaint. The Complaint should be read as a whole document.

Petitioners' counsel is a patent attorney not lacking the ability to withhold a period until every idea is packed into one huge run-on sentence. But a civil complaint drafted like a patent claim would not give a defendant fair notice of what the complaint is about. Where the initial plain-but-conclusory allegations are immediately followed by several levels of additional detail and by thirty pages of documentation and proof, as was the case here, then the only fair way to construe such a complaint is as a whole—*in pari materia*— and not as isolated statements subject to isolated analysis as was done by the district court here.

Surely the tightening of pleading requirements and application of the plausibility standard does not require that every future complaint be written in monstrous run-on sentences and multi-page paragraphs that touch every element and every shred of evidence before daring to divulge what a lawsuit is about.

CONCLUSION

Because Petitioners as civil RICO Plaintiffs filed a Complaint alleging the specifics of a pattern of mail and wire fraud, including attached evidence, because no further allegation or proof of an additional "criminal act" is properly required, and because the opinion below states an erroneous standard for Rule 12 dismissal of civil actions, Petitioners' action should be reinstated.

Because Petitioners have a right under Rule 15(a) to make a first amendment before responsive pleading to their Complaint, and because factors justifying denial of amendment were not considered and are not present, Petitioners' civil RICO action should be reinstated and allowed to be amended.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

Mark Edw. Andrews

Counsel of Record

Andrews Arts & Sciences Law, LLC

7104 Coliseum St.

New Orleans, LA 70118-4818

504-865-8191

mea@mealaw.com

Attorney for Petitioners